

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**To: Honorable David F. Levi, Chair, Standing Committee on
Rules of Practice and Procedure**

**From: Lee H. Rosenthal, Chair, Advisory Committee on
Federal Rules of Civil Procedure**

Date: May 17, 2004, Revised, August 3, 2004

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at a conference on electronic discovery at Fordham Law School on February 20-21, 2004, and met again at the Administrative Office of the United States Courts on April 15-16, 2004. Style Subcommittees A and B met at Fordham Law School, one on February 19 and the other on February 21. The Discovery Subcommittee met on March 20 at the Administrative Office of the United States Courts. The several Subcommittees also met by conference calls during the time since the January meeting of the Standing Committee.

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Part I B recommends several proposals for publication for comment in August 2004. One proposal is to amend Rule 50. A package of proposals aimed at discovery of electronically stored information includes amendments to Rules 16, 26, 33, 34, 37, and 45, along with a related amendment of Form 35. Another package includes a new Supplemental Rule G for civil asset forfeiture actions, along with conforming amendments of Supplemental Rules A, C, and E.

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II Action Items: Rules Recommended for Publication

**A. PROPOSED AMENDMENTS INVOLVING
ELECTRONIC DISCOVERY**

Introduction

The Civil Rules Committee recommends that the Standing Committee publish for comment a package of proposed rule amendments relating to the discovery of electronically stored information. Over the past five years, the Committee has examined whether the rules adequately accommodate discovery of information generated by, stored in, retrieved from, and exchanged through, computers. During this period, electronic discovery has moved from an unusual activity encountered in large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in the federal courts. The Committee has been urged by organized bar groups, litigants, lawyers, and judges to consider rules changes that accommodate the distinctive features of such discovery.

Electronic discovery exhibits several distinctive features that may warrant treatment in the rules. Perhaps the most prominent is the exponentially greater volume that characterizes electronic data, which makes this form of discovery more burdensome, costly, and time-consuming.

The *Manual for Complex Litigation* (4th) § 11.446 illustrates the problems of volume that can arise with electronically stored information:

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Electronically stored information may exist in dynamic databases that do not correspond to hard-copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers—including the simple act of turning a computer on or off or accessing a particular file—can alter or destroy electronically stored information, and computer systems automatically discard or overwrite data as a part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard-copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve, or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery. Uncertainty as to how to treat these distinctive features under the present rules exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review. Although the federal discovery rules are well drafted to be flexible, it is becoming increasingly clear that they do not adequately accommodate the new forms of information technology. If the rules do not change, they risk becoming increasingly removed from practice.

The uncertainties and problems lawyers, litigants, and judges face in handling electronic discovery under the present federal discovery rules are reflected in the growing demand for additional rules in this area. At least four United States district courts have adopted local rules to address electronic discovery, and many more are under consideration. Two states have, and more are considering, court rules specifically addressing these issues. There is much to be said for these local rules and much has been learned from experience under them. But if there is delay in considering whether to change the federal rules, the timetable of the rulemaking process will inevitably result in a proliferation of local rules. Adoption of differing local rules by many district courts may freeze in place different practices and frustrate the ability to achieve the national standard the Civil Rules were intended to provide in the areas they address. As electronic discovery becomes more and more common, the burdens and costs of complying with unclear and inconsistent discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, will also increase.

Publication for comment is more critical in this area than for many other proposed rule amendments. Litigants and lawyers live with the problems raised by electronic discovery in ways that judges do not. The Advisory Committee welcomes comments on all aspects of the proposed amendments and has indicated certain areas in which comment will be particularly helpful. The comments from litigants and lawyers on specific proposals for rules that attempt to accommodate electronic discovery, as it is practiced today and as it will develop in the future, are essential. The challenge is to ensure that the rules provide effective support and guidance for managing discovery practice as it changes with technology.

1. Background and Synopsis

To gather information from diverse segments of the bar and to hear from judges, the Committee held two mini-conferences in 2000—one in San Francisco and the other in Brooklyn—and a major conference in February 2004 at the Fordham Law School. The Committee has also drawn on the accumulation of experience reflected in case law, in the expanded treatment in the fourth edition of the *Manual for Complex Litigation*, and in “best practices” protocols drafted by the ABA Litigation Section and other organized bar groups. This work has led the Committee to conclude that it is time to present proposed rule changes for public comment. Through its discovery subcommittee, chaired by Professor Myles Lynk and supported by Professor Edward Cooper, Reporter to the Committee, and Professor Richard L. Marcus, who was retained as Special Reporter to assist the subcommittee, the Committee has drafted proposed amendments to Rules 16, 26, 33, 34, 37, and 45 and revisions to Form 35, with accompanying Notes. These amendments are aimed at making the rules better able to accommodate the qualitative and quantitative differences between electronic discovery and conventional discovery and to provide a framework to resolve the issues electronic discovery presents.

The proposed amendments address five related areas: (a) early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and problems of reviewing electronically stored information for privilege; (b) discovery of electronically stored information that is not reasonably accessible; (c) the assertion of privilege after production; (d) the application of Rules 33 and 34 to electronically stored information; and (e) a limit on sanctions under Rule 37 for the loss of electronically stored

information as a result of the routine operation of computer systems. In addition, amendments to Rule 45 are made to correspond to the proposed changes in Rules 26-37.

2. The Discovery Rules Proposals

a. Early Attention to Electronic Discovery Issues

The proposed amendments to Rule 16, Rule 26(f), and Form 35 present a framework for the parties and court to give early attention to issues relating to the disclosure or discovery of electronically stored information. Under the proposed amendments to Rule 26(f), the parties are to address during their conference any issues relating to the disclosure or discovery of electronically stored information, including the form of production, and also to discuss issues relating to the preservation of electronically stored information and other information that may be sought during discovery. In addition, the amendment to Rule 26(f) calls for discussion of whether the parties can agree on an approach to production that protects against privilege waiver. The results of these discussions are to be included, as appropriate, in the discovery plan presented to the court. Form 35 is amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. The scheduling order under Rule 16, as amended, may include provisions on the disclosure or discovery of electronically stored information and may include a case-management order adopting the parties' agreements for protection against waiving privilege.

These provisions focus early attention on managing discovery of electronically stored information in cases where problems are likely to

arise. The Committee Note emphasizes that if the parties do not anticipate discovery of electronically stored information, there is no need to discuss these issues. When such discovery is anticipated, the rule amendments focus the parties and the court on early identification and resolution of problems, particularly in the sensitive areas of form of production, privilege review, and preservation. The volume and dynamic nature of electronically stored information make the problems presented by each of these areas more acute than in conventional discovery.

These proposed amendments to Rules 16(b) and 26(f) and to Form 35 work in tandem with proposed amendments to Rule 34(b), which authorize the requesting party to specify the form in which electronically stored information should be produced and set up a framework for resolving disputes over the form of producing such information; Rule 26(b)(2), which state that a party need not provide discovery of electronically stored information that is not reasonably accessible unless the court orders discovery for good cause; Rule 26(b)(5)(B), which provide a procedure for asserting privilege after production of privileged information; and Rule 37(f), which address a party's inability to provide discovery of electronically stored information lost as a result of the routine operation of a party's electronic information system.

The proposals focus on three particularly troublesome aspects of discovery of electronically stored information. One is preserving electronically stored information. As the Note to proposed Rule 26(f) points out, the volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Suspension of all

or a significant part of that activity could paralyze a party's operations. An overbroad approach to preservation may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their operations. In Rule 26(f), the parties are directed to discuss preservation of discoverable information during their conference to develop the discovery plan. Although this provision applies to all discoverable information, it is particularly important with regard to electronically stored information. The Note emphasizes that the parties should be specific, balancing preservation needs with the need to continue ordinary operations of computer systems. Rule 16(b)(5) states that the scheduling order should include provisions relating to discovery of electronic information that emerge from the parties' conference and that the court approves, which may include preservation of electronic information.

The second area is privilege review and waiver. The Committee has repeatedly been told that the burden, costs, and difficulties of privilege review are compounded with electronically stored information. The volume of such information and the informality of certain kinds of electronic communications, such as e-mails, make privilege review more difficult, time-consuming, and expensive. Materials subject to a claim of privilege are often difficult to identify, in part because computers may retain information that is not apparent to the reader. Such information may include embedded data (earlier edits that may be hidden from a "paper" view of the material or the image displayed on a computer monitor) and metadata (automatically created identifying information about the history or management of an electronic file). Parties frequently attempt to minimize the cost and delay of an exhaustive privilege review by agreeing to protocols that minimize the risk of waiver. Such protocols may include so-called quick peek or claw back arrangements, which allow production

without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The *Manual for Complex Litigation* notes these difficulties:

A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

The proposed amendments to Rule 16(b)(6), Rule 26(f)(4), and Form 35 provide that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement. The proposed amendments do not require the parties to reach such an agreement or authorize the court to order one without the parties' agreement. Although the amendments apply to all discoverable

information, they are particularly important with regard to electronically stored information.

The proposed amendment of Rule 26(f)(4) is limited to the parties' discussion of whether to include in the discovery plan an agreement that the court should enter an order protecting the right to assert privilege after production of privileged information. The Committee is particularly interested in receiving comment on whether this amendment should be less restrictive, similar to proposed Rule 26(f)(3). A less restrictive rule would direct the parties to discuss and include in the discovery plan any issues relating to the protection of privileged information in discovery. The third area of focus is the form of production. Unlike conventional discovery, in which there is essentially one option for the form in which information is provided—paper—electronic discovery presents a number of options. These options include the choice between production in hard-copy or electronic form, as well as choices among different electronic formats. The proposed amendments to Rules 16(b) and 26(f)(3) and to Form 35 direct the parties to consider, and the court to include in the scheduling order, provisions for discovery of electronically stored information, which could include arrangements for the form of production.

b. Discovery into Electronically Stored Information that is Not Reasonably Accessible

The proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, an increasingly disputed aspect of such discovery. The Note explains that the proposed amendment is required because of the staggering volume of electronically

stored information and because of the variety of ways in which such information is maintained. The Note gives some explanation of the term “reasonably accessible.” The term often means information that the party itself routinely accesses or uses or that is easily located and retrieved. By contrast, information stored only for disaster recovery is generally expensive to restore and is disorganized. Legacy data is stored information that is no longer used and only maintained on an obsolete system, making it expensive and burdensome to restore and provide. Deleted data may also be considered inaccessible if, despite the possibility of restoration through forensic techniques, significant cost, effort, and burden is required. The Committee is particularly interested in comment on whether further explanation of the term “reasonably accessible” in the Note would be helpful and what should be included.

The proposed addition to Rule 26(b)(2) builds on the two-tier structure of scope of discovery defined in Rule 26(b)(1) and applies the structure to the burden of discovery into electronically stored information.

A party must provide discovery of relevant reasonably accessible electronically stored information without a court order. A party need not review or provide discovery of electronically stored information that it identifies as not reasonably accessible. If the requesting party moves for discovery of such information—the second tier—the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order the party to provide the information, but the order must be based on a showing of good cause by the requesting party. The good-cause analysis balances the requesting party’s need for the information against the burden on the responding party. Courts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(i), (ii), and (iii)—whether the burden or expense of the proposed discovery outweighs its likely benefit taking into account the needs of the

case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues—in deciding when and whether the effort involved in obtaining such information is warranted. The rule makes it clear that the producing party has the burden of demonstrating that the requested electronically stored information is inaccessible and that the requesting party has the burden of demonstrating good cause for the production of inaccessible information.

The court may—as with any discovery—impose conditions and terms in ordering discovery of electronically stored information that is not reasonably accessible. The Note points out that such terms and conditions could include sampling electronically stored information to gauge the likelihood that relevant information will be obtained, the importance of that information, and the burdens and costs of production; limits on the amount of information to be produced; and provisions regarding the cost of production. The Committee is particularly interested in receiving public comment on whether proposed Rule 26(b)(2) and Note give sufficient guidance to litigants, lawyers, and judges on determining the proper limits of electronic discovery and on appropriate terms and conditions, including allocating the costs of such discovery.

c. Procedure for Asserting Privilege After Production

The volume of electronically stored information responsive to discovery can be extremely great and certain features of such information make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic. The proposed amendment to Rule 26(b)(5) addresses these problems by setting up a

procedure to apply when a responding party asserts that it has produced privileged information without intending to waive the privilege. Although particularly important with regard to electronically stored information, this rule would apply to all discovery. The proposed amendment does not address how to resolve whether the privilege has been waived or forfeited, respecting the special statutory procedures in 28 U.S.C. § 2074(b) for adopting rules that modify a privilege. Instead, the amendment sets up a procedure to allow the responding party to assert privilege after production and to require the return, sequestration, or destruction of the material pending resolution of the privilege claim. This supplements the existing procedure in Rule 26(b)(5) for a party that has withheld information on the ground of privilege to assert the claim, the requesting party to contest the claim, and the court to resolve the dispute.

The proposed amendment would require a party that has produced information without intending to waive a claim of privilege to act within a reasonable period to notify the receiving party that it has produced privileged material. The Note describes factors a court might use in determining whether the privilege was claimed within a “reasonable time,” such as: (1) the date when the producing party learned of the production; (2) the extent to which other parties have made use of the information; (3) the magnitude of the production; and (4) the difficulty of discerning that the material was privileged. No particular form of notice is prescribed. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not disclose it to third parties. The Note states that a party that has disclosed or provided the information to a nonparty before receiving notice should attempt to obtain the return of the information or arrange for it to be destroyed. The producing party must then preserve the information and put it on a privilege log, pending the court’s ruling on whether the information is, in

fact, privileged and whether any privilege has been waived or forfeited by inadvertent production.

The proposed amendment sets out a procedure to resolve whether the production waived or forfeited a privilege, but does not set out the standards for making this decision. The Committee Note emphasizes that courts have developed principles to decide whether waiver or forfeiture results from inadvertent production of privileged information.

It has been suggested that the proposed amendment should include a requirement that a party who receives notice that privileged material has been produced must certify that the material has been sequestered or destroyed if it is not returned. The Committee is particularly interested in receiving comment on whether such a requirement would be helpful.

d. The Proposed Changes to Rule 33 and 34

The proposed changes to Rules 33 and 34 are designed to adapt them to discovery of electronically stored information. The proposed amendments to Rule 33 clarify that an answer to an interrogatory involving review of business records should also involve a search of electronically stored information and permit the responding party to answer by providing access to that information. Consistent with the option to produce hard-copy or paper business records in response to interrogatories, Rule 33(d) allows a responding party to substitute access to electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Under Rule 33(d), a party electing to respond to an interrogatory by providing electronically stored

information must ensure that the interrogating party is able to locate and identify it as readily as the responding party, and the responding party must give the interrogating party a “reasonable opportunity to examine, audit or inspect” the information. The Note recognizes that special difficulties may arise in satisfying these provisions as applied to electronically stored information. Aspects of the form in which the information is maintained or the need for a particular system to make it intelligible may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party.

The proposed amendments to Rule 34 expressly distinguish between electronically stored information and “documents.” The term “documents” cannot be stretched to accommodate all the differences between paper and electronically stored information in all the rules. Like documents, electronically stored information is expansively defined to avoid limitation to existing technologies.

The amended Rule 34 distinction between documents and electronically stored information means that lawyers and litigants should frame discovery requests to specify whether they seek discovery of documents, electronically stored information, or both. Common usage of “documents” under present Rule 34 has been inconsistent. At times, requests for “documents” have included both electronically stored information and hard-copy materials; at other times, requests for “documents” have been limited to only hard-copy materials. The clarification in the amended rule to define “documents” as separate from “electronically stored information” may change prior usage. The

Committee is particularly interested in comments on whether Rule 34 itself or the Note should specifically state that a responding party should not avoid reviewing and producing electronically stored information because a production request did not separately seek it, and—if so—what language would be the most helpful and appropriate.

The proposed amendment to Rule 34(b) provides that the request for production may specify the form in which electronically stored information is to be produced. The objections that can respond to a production request may include objections to the requested form for producing electronically stored information. The proposed amendment provides that if there is no request for a specific form for producing electronically stored information, and if the parties do not agree to a particular form and the court does not order one, the producing party has two options: to produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The Note points out that these choices are analogous to the choices provided for producing hard-copy documents: the form in which it is kept in the usual course of business or organized and labeled to correspond to the categories in the request. The Committee is particularly interested in receiving public comment on whether the proposed options for production of electronically stored information are suitably analogous to the existing options for production of hard-copy materials.

The proposed amended rule provides that absent court order or party agreement, the responding party need only produce the information in one form. These changes clarify the application of Rule 34 to electronically stored information and provide a framework for resolving disputes over the form of production.

The amendment also makes it clear that the obligation to produce for testing and sampling applies to electronically stored information and documents, as well as tangible things and land or other property; the present rule does not make clear that testing and sampling applies to documents or electronically stored information.

e. Rule 37 Sanctions

The proposed amendment to Rule 37 provides a narrow “safe harbor” to a party that fails to provide electronically stored information, under specified circumstances. The amendment protects the party from sanctions under the Civil Rules for failing to provide electronically stored information lost because of the routine operation of the party’s computer system. The safe harbor does not apply if the party violated an order issued in the action requiring it to preserve electronically stored information, or if the party failed to take reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action.

The Committee Note explains that the purpose of this new section is to address a unique and necessary feature of computer systems—the automatic recycling, overwriting, and alteration of electronically stored information. There is great uncertainty as to whether and when a party may continue some or all of the routine recycling or overwriting functions of its computer system without risk of sanctions. Suspension of such operations can be prohibitively expensive and burdensome and can result in the accumulation of duplicative and irrelevant data that must be reviewed and produced, making discovery more expensive and time-consuming. Despite such costs and burdens, the uncertainty and the prospect of sanctions may undermine rational consideration of

preservation obligations; particularly for parties that are frequently sued. The Committee has heard strong arguments in support of better guidance in the rules. As the Committee Note points out, proposed Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. The proposed amendment does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced.

Proposed Rule 37(f) requires that a party seeking to invoke the “safe harbor” must have taken reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a “litigation hold.” The Note points out that the reasonableness of a litigation hold is related to the scope of discovery under Rule 26(b)(1). The reasonableness of a litigation hold is also related to the proposed new provision in Rule 26(b)(2), which states that electronically stored information not reasonably accessible is discoverable only on court order, for good cause. The Note explains that in most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order. For example, once the subjects of litigation are identified, reasonably accessible e-mail records and electronic “files” of key individuals and departments are obvious candidates for preservation. In some instances, however, a party may not act reasonably unless it preserves electronically stored information that is not reasonably accessible—if the party knew or should have known that the information was discoverable in the action and could not be obtained elsewhere. The Note emphasizes that in assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve electronically stored information.

The Committee is continuing to examine the degree of culpability or fault that will preclude eligibility for a safe harbor from sanctions in this narrow area, where electronically stored information is lost or destroyed as a result of the routine operation of a party's computer system. Some have voiced concern that the proposed amendment to Rule 37 is inadequate because it only provides protection from sanctions for conduct unlikely to be sanctioned under current rules: when information is lost despite a party's reasonable efforts to preserve the information and no court order is violated. Others have voiced concern that raising the culpability standard would provide inadequate assurance that relevant information is preserved for discovery. Existing appellate case law does not specifically address this narrow area of electronically stored information lost because of the routine operation of computer systems. Most—but not all—courts require a level of fault beyond negligence before imposing a severe sanction—such as dismissing an action—for a party's failure to preserve discoverable material, depending in part on whether the failure has resulted in prejudice. Lesser sanctions—such as awarding the costs of discovery or attorney's fees—have been imposed without requiring such high culpability. The Committee is particularly interested in receiving comments from the bench and bar on whether the standard that makes a party ineligible for a safe harbor should be negligence, or a greater level of culpability or fault, in failing to prevent the loss of electronically stored information as a result of the routine operation of a computer system. To focus comment on this issue, the footnote to proposed Rule 37(f) sets out an example of an amendment framed in terms of intentional or reckless failure to preserve electronically stored information lost as a result of the ordinary operation of a party's computer system.

The Committee is also particularly interested in public comment on whether the proposed Rule and Note adequately and accurately describe the kind of automatic computer operations, such as recycling and overwriting, that should be covered by a safe harbor. The Committee intends that the phrase, “the routine operation of the party’s electronic information system,” identifies circumstances in which automatic computer functions that are generally applied result in the loss of information. The Committee is concerned that there be adequate guidance as to the aspects of an electronic information system that are within the proposed rule, without being limited to existing technology.

The proposed amendments to Rule 45 conform the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.

3. Conclusion

The problems of electronic discovery reflect the extent of changes in technology. The stuff of discovery is information, and technology has fundamentally altered how information is created, stored, and exchanged. The Committee has already received thoughtful comments from the bench and bar emphasizing that amendments to the discovery rules to accommodate the effects of technology must be approached with great care. The fact that changes in technology will continue to occur, at speeds and in ways that we cannot predict, requires that we proceed with caution. The discovery rules must recognize the fundamental changes that have already occurred, but remain flexible enough to accommodate changes that will develop in the future. The Advisory Committee requests publication of these proposals and looks forward to an informative period of public comment.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

* New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF CIVIL PROCEDURE

13 (4) modifications of the times for disclosures under Rules
14 26(a) and 26(e)(1) and of the extent of discovery to be
15 permitted;

16 (5) provisions for disclosure or discovery of electronically
17 stored information;

18 (6) adoption of the parties' agreement for protection
19 against waiving privilege;

20 (75) the date or dates for conferences before trial, a final
21 pretrial conference, and trial; and

22 (86) any other matters appropriate in the circumstances of
23 the case.

24 The order shall issue as soon as practicable but in any event within
25 90 days after the appearance of a defendant and within 120 days
26 after the complaint has been served on a defendant. A schedule
27 shall not be modified except upon a showing of good cause and

avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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(b) Discovery Scope and Limits. Unless otherwise limited by

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order of the court in accordance with these rules, the scope

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of discovery is as follows:

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(2) Limitations. By order, the court may alter the limits in

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these rules on the number of depositions and interrogatories

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or the length of depositions under Rule 30. By order or

9 local rule, the court may also limit the number of requests
10 under Rule 36. The frequency or extent of use of the
11 discovery methods otherwise permitted under these rules
12 and by any local rule shall be limited by the court if it
13 determines that: (i) the discovery sought is unreasonably
14 cumulative or duplicative, or is obtainable from some other
15 source that is more convenient, less burdensome, or less
16 expensive; (ii) the party seeking discovery has had ample
17 opportunity by discovery in the action to obtain the
18 information sought; or (iii) the burden or expense of the
19 proposed discovery outweighs its likely benefit, taking into
20 account the needs of the case, the amount in controversy,
21 the parties' resources, the importance of the issues at stake
22 in the litigation, and the importance of the proposed
23 discovery in resolving the issues. The court may act upon its
24 own initiative after reasonable notice or pursuant to a motion

41 things not produced or disclosed in a manner that,
42 without revealing information itself privileged or
43 protected, will enable other parties to assess the
44 applicability of the privilege or protection.

45 **(B) Privileged information produced.** When a
46 party produces information without intending to waive
47 a claim of privilege it may, within a reasonable time,
48 notify any party that received the information of its
49 claim of privilege. After being notified, a party must
50 promptly return, sequester, or destroy the specified
51 information and any copies. The producing party must
52 comply with Rule 26(b)(5)(A) with regard to the
53 information and preserve it pending a ruling by the
54 court.

55 * * * * *

56 **(f) Conference of Parties; Planning for Discovery.** Except
57 in categories of proceedings exempted from initial disclosure
58 under Rule 26(a)(1)(E) or when otherwise ordered, the parties
59 must, as soon as practicable and in any event at least 21 days
60 before a scheduling conference is held or a scheduling order is
61 due under Rule 16(b), confer to consider the nature and basis of
62 their claims and defenses and the possibilities for a prompt
63 settlement or resolution of the case, to make or arrange for the
64 disclosures required by Rule 26(a)(1), to discuss any issues
65 relating to preserving discoverable information, and to develop a
66 proposed discovery plan that indicates the parties' views and
67 proposals concerning:

68 (1) what changes should be made in the timing, form, or
69 requirement for disclosures under Rule 26(a), including a
70 statement as to when disclosures under Rule 26(a)(1) were
71 made or will be made;

72 (2) the subjects on which discovery may be needed, when
73 discovery should be completed, and whether discovery
74 should be conducted in phases or be limited to or focused
75 upon particular issues;

76 (3) any issues relating to disclosure or discovery of
77 electronically stored information, including the form in which
78 it should be produced;

79 (4) whether, on agreement of the parties, the court should
80 enter an order protecting the right to assert privilege after
81 production of privileged information;

82 (53) what changes should be made in the limitations on
83 discovery imposed under these rules or by local rule, and
84 what other limitations should be imposed; and

85 (64) any other orders that should be entered by the court
86 under Rule 26(c) or under Rule 16(b) and (c).

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87 The attorneys of record and all unrepresented parties that
88 have appeared in the case are jointly responsible for arranging the
89 conference, for attempting in good faith to agree on the proposed
90 discovery plan, and for submitting to the court within 14 days after
91 the conference a written report outlining the plan. A court may
92 order that the parties or attorneys attend the conference in person.
93 If necessary to comply with its expedited schedule for Rule 16(b)
94 conferences, a court may by local rule (i) require that the
95 conference between the parties occur fewer than 21 days before
96 the scheduling conference is held or a scheduling order is due
97 under Rule 16(b), and (ii) require that the written report outlining
98 the discovery plan be filed fewer than 14 days after the
99 conference between the parties, or excuse the parties from
100 submitting a written report and permit them to report orally on
101 their discovery plan at the Rule 16(b) conference.

102 * * * * *

Committee Note

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address some of the distinctive features of electronically stored information, including the volume of that information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information. Many parties have significant quantities of electronically stored information that can be located, retrieved, or reviewed only with very substantial effort or expense. For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action. Some information may be “legacy” data retained in obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible.

In many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to obtain additional information may be substantial. The rule addresses this concern by providing that a responding party need not provide electronically stored information that it identifies as not reasonably accessible. If the requesting party moves to compel additional discovery under Rule 37(a), the responding party must show that the information is not reasonably accessible. Even if the information is not reasonably

accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(2)(i), (ii), and (iii).

The *Manual for Complex Litigation* (4th) § 11.446 illustrates the problems of volume that can arise with electronically stored information:

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

With volumes of these dimensions, it is sensible to limit discovery to that which is within Rule 26(b)(1) and reasonably accessible, unless a court orders broader discovery based on a showing of good cause.

Whether given information is “reasonably accessible” may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information. If the party routinely uses the information—sometimes called “active data”—the information would ordinarily be considered reasonably accessible. The fact that the party does not routinely access the information does not necessarily mean that access requires substantial effort or cost.

Technological developments may change what is “reasonably accessible” by removing obstacles to using some electronically stored information. But technological change can also impede access by, for

example, changing the systems necessary to retrieve and produce the information.

The amendment to Rule 26(b)(2) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible. The responding party must identify the information it is neither reviewing nor producing on this ground. The specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case. For example, the responding party may describe a certain type of information, such as information stored solely for disaster recovery purposes. In other cases, the difficulty of accessing the information—as with “legacy” data stored on obsolete systems—can be described. The goal is to inform the requesting party that some requested information has not been reviewed or provided on the ground that it is not reasonably accessible, the nature of this information, and the basis for the responding party’s contention that it is not reasonably accessible. But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information.

If the requesting party moves to compel discovery, the responding party must show that the information sought is not reasonably accessible to invoke this rule. Such a motion would provide the occasion for the court to determine whether the information is reasonably accessible; if it is, this rule does not limit discovery, although other limitations—such as those in Rule 26(b)(2)(i), (ii), and (iii)—may apply. Similarly, if the responding party sought to be relieved from providing such information, as on a motion under Rule 26(c), it would have to demonstrate that the information is not reasonably accessible to invoke the protections of this rule.

The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include sampling electronically stored information to gauge the likelihood that relevant information will be obtained, the importance of that information, and the burdens and costs of production; limits on the amount of information to be produced; and provisions regarding the cost of production.

When the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause. The good-cause analysis would balance the requesting party's need for the information and the burden on the responding party. Courts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(i), (ii), and (iii) for guidance in deciding when and whether the effort involved in obtaining such information is warranted. Thus *Manual for Complex Litigation* (4th) § 11.446 invokes Rule 26(b)(2), stating that "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." It adds: "More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, should be conditioned upon a showing of need or sharing expenses."

The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001). Courts will adapt the principles of Rule 26(b)(2) to the specific circumstances of each case.

Subdivision (b)(5). The Committee has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on grounds of privilege to make a privilege claim so that the requesting party can contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party that has produced privileged information without intending to waive the privilege to assert that claim and permit the matter to be presented to the court for its determination.

Rule 26(b)(5)(B) does not address whether there has been a privilege waiver. Rule 26(f) is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b) is amended to alert the court to consider a case-management order to provide for protection against waiver of privilege. Orders entered under Rule 16(b)(6) may bear on whether a waiver has occurred. In addition, the courts have developed principles for determining whether waiver results from inadvertent production of privileged information. *See* 8 Fed. Prac. & Pro. § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a “reasonable time.” Many factors bear on whether the party gave notice within a reasonable time in a given case, including the date when the producing party learned of the production, the extent to which other parties had made use of the information in connection with the litigation, the difficulty of discerning that the material was privileged, and the magnitude of production.

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should depend on the circumstances of the case. In many cases informal but very rapid and effective means of asserting a privilege claim as to produced information, followed by more formal notice, would be reasonable. Whatever the method, the notice should be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned, sequestered, or destroyed.

Each party that received the information must promptly return, sequester, or destroy it on being notified. The option of sequestering or destroying the information is included because the receiving party may have incorporated some of the information in protected trial-preparation materials. After receiving notice, a party must not use, disclose, or disseminate the information pending resolution of the privilege claim. A party that has disclosed or provided the information to a nonparty before receiving notice should attempt to obtain the return of the information or arrange for it to be destroyed.

Whether the information is returned or not, the producing party must assert its privilege in compliance with Rule 26(b)(5)(A) and preserve the information pending the court's ruling on whether the privilege is properly asserted and whether it was waived. As with claims of privilege made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

If the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information.

Subdivision (f). Early attention to managing discovery of electronically stored information can be important. Rule 26(f) is amended to direct the parties to discuss these subjects during their discovery-planning conference. *See Manual for Complex Litigation* (4th) § 11.446 (“The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case. . .”). The rule focuses on “issues related to disclosure or discovery of electronically stored information”; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, addressing the issues at the outset should often avoid problems that might otherwise arise later in the litigation, when they are more difficult to resolve.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties’ information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party’s computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be

sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2). The form or format in which a party keeps such information may be considered, as well as the form in which it might be produced. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." *Manual for Complex Litigation* (4th) § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b) is amended to permit a party to specify the form in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. Any aspects of disclosing or discovering electronically stored information discussed under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included. The court may then address the topic in its Rule 16(b) order.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order

may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.”) Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party’s electronic information system. The parties’ discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and other tangible evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.

Rule 26(f) is also amended to provide that the discovery plan may include any agreement that the court enter a case-management order facilitating discovery by protecting against privilege waiver. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in waiver of privilege as to all other privileged materials on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information poses particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic document file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic document (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

The *Manual for Complex Litigation* notes these difficulties:

A responding party’s screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a “nonwaiver” agreement, which they can adopt as a case-management order.

Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to “take back” inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide requested materials for initial examination without waiving any privilege—sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements—sometimes called “clawback agreements”—providing that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation.

As noted in the *Manual for Complex Litigation*, these agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. As the *Manual* also notes, a case-management order implementing such agreements can further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent

privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to emphasize the court's entry of an order recognizing and implementing such an agreement as a case-management order. The amendment to Rule 26(f) is modest; the entry of such a case-management order merely implements the parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to provide an additional protection against privilege waiver by establishing a procedure for assertion of privilege after production, leaving the question of waiver to later determination by the court if production is still sought.

Rule 33. Interrogatories to Parties

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(d) Option to Produce Business Records. Where the answer

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to an interrogatory may be derived or ascertained from the

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business records, including electronically stored information, of the

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party upon whom the interrogatory has been served or from an

6

examination, audit or inspection of such business records,

7

including a compilation, abstract or summary thereof, and the

8

burden of deriving or ascertaining the answer is substantially the

9 same for the party serving the interrogatory as for the party
10 served, it is a sufficient answer to such interrogatory to specify the
11 records from which the answer may be derived or ascertained
12 and to afford to the party serving the interrogatory reasonable
13 opportunity to examine, audit or inspect such records and to
14 make copies, compilations, abstracts or summaries. A
15 specification shall be in sufficient detail to permit the interrogating
16 party to locate and to identify, as readily as can the party served,
17 the records from which the answer may be ascertained.

Committee Note

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term “electronically stored information” has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an

answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) says that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it “as readily as can the party served,” and also provides that the responding party must give the interrogating party a “reasonable opportunity to examine, audit or inspect” the information. Depending on the circumstances of the case, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, access to the pertinent computer system, or other assistance. The key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party.

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

- 1 **(a) Scope.** Any party may serve on any other party a request
2 (1) to produce and permit the party making the request, or
3 someone acting on the requestor’s behalf, to inspect, ~~and~~ copy,
4 test, or sample any designated electronically stored information or
5 any designated documents (including writings, drawings, graphs,
6 charts, photographs, sound recordings, images~~phonorecords~~, and

7 other data or data compilations in any medium—from which
8 information can be obtained, translated, if necessary, by the
9 respondent through detection devices into reasonably usable
10 form), or to inspect, ~~and~~ copy, test, or sample any designated
11 tangible things which constitute or contain matters within the scope
12 of Rule 26(b) and which are in the possession, custody or control
13 of the party upon whom the request is served; or (2) to permit
14 entry upon designated land or other property in the possession or
15 control of the party upon whom the request is served for the
16 purpose of inspection and measuring, surveying, photographing,
17 testing, or sampling the property or any designated object or
18 operation thereon, within the scope of Rule 26(b).

19 **(b) Procedure.** The request shall set forth, either by individual
20 item or by category, the items to be inspected, and describe each
21 with reasonable particularity. The request shall specify a
22 reasonable time, place, and manner of making the inspection and

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23 performing the related acts. The request may specify the form in
24 which electronically stored information is to be produced.

25 Without leave of court or written stipulation, a request may not be
26 served before the time specified in Rule 26(d).

27 The party upon whom the request is served shall serve a
28 written response within 30 days after the service of the request.

29 A shorter or longer time may be directed by the court or, in the
30 absence of such an order, agreed to in writing by the parties,

31 subject to Rule 29. The response shall state, with respect to each
32 item or category, that inspection and related activities will be

33 permitted as requested, unless the request is objected to, including
34 an objection to the requested form for producing electronically

35 stored information, stating in which event the reasons for the
36 objection ~~shall be stated~~. If objection is made to part of an item

37 or category, the part shall be specified and inspection permitted
38 of the remaining parts. The party submitting the request may

39 move for an order under Rule 37(a) with respect to any objection
40 to or other failure to respond to the request or any part thereof,
41 or any failure to permit inspection as requested.

42 Unless the parties otherwise agree, or the court otherwise
43 orders,

44 (i) a~~A~~ party who produces documents for inspection shall
45 produce them as they are kept in the usual course of
46 business or shall organize and label them to correspond with
47 the categories in the request; and

48 (ii) if a request for electronically stored information does not
49 specify the form of production, a responding party must
50 produce the information in a form in which it is ordinarily
51 maintained, or in an electronically searchable form. The
52 party need only produce such information in one form.

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Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of “documents” and “things.” In 1970, Rule 34(a) was amended to authorize discovery of data compilations in anticipation that the use of computerized information would grow in importance. Since that time, the growth in electronically stored information and in the variety of systems for creating and storing such information have been dramatic. It is difficult to say that all forms of electronically stored information fit within the traditional concept of a “document.” Accordingly, Rule 34(a) is amended to acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. The title of Rule 34 is modified to acknowledge that discovery of electronically stored information stands on equal footing with discovery of documents. Although discovery of electronically stored information has been handled under the term “document,” this change avoids the need to stretch that word to encompass such discovery. At the same time, a Rule 34 request for production of “documents” should be understood to include electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. The definition in Rule 34(a)(1) is expansive, including any type of information that can be stored electronically. A common example that is sought through discovery is electronic communications, such as e-mail. A reference to “images” is added to clarify their inclusion in the listing already provided. The reference to “data or data compilations” includes any databases currently in use or developed in the future. The rule covers information stored “in any medium,” to encompass future developments in computer technology.

Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to “electronically stored information” should be understood to invoke this expansive definition. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the definition in Rule 34(a)(1) is invoked in a number of other amendments, such as those to Rules 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1).

The definition of electronically stored information is broad, but whether material within this definition should be produced, and in what form, are separate questions that must be addressed under Rule 26(b)(2), Rule 26(c), and Rule 34(b).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c).

Rule 34(a)(1) is further amended to make clear that tangible things must—like documents and land sought through discovery—be designated in the request.

Subdivision (b). The amendment to Rule 34(b) permits the requesting party to designate the form in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although one format a requesting party could designate would be hard copy. Specification of the desired form may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The parties should exchange information about the form of production well before production actually occurs, such as during the early opportunity provided by the Rule 26(f) conference. Rule 26(f) now calls for discussion of form of production during that conference.

The rule does not require the requesting party to choose a form of production; this party may not have a preference, or may not know what form the producing party uses to maintain its electronically stored information. If the request does not specify a form of production for electronically stored information, Rule 34(b) provides that the responding party must—unless the court orders otherwise or the parties otherwise agree—choose between options analogous to those provided for hard-copy materials. The responding party may produce the information in a form in which it ordinarily maintains the information. If it ordinarily maintains the information in more than one form, it may select any such form. But the responding party is not required to produce the information in a form in which it is maintained. Instead, the responding party may produce the information in a form it selects for the purpose of production, providing the form is electronically searchable. Although this option is not precisely the same as the option to produce hard-copy materials organized

and labelled to correspond to the requests, it should be functionally analogous because it will enable the party seeking production to locate pertinent information.

If the requesting party does specify a form of production, Rule 34(b) permits the responding party to object. The grounds for objection depend on the circumstances of the case. When such an objection is made, Rule 37(a)(2)(B) requires the parties to confer about the subject in an effort to resolve the matter before a motion to compel is filed. If they cannot agree, the court will have to resolve the issue. The court is not limited to the form initially chosen by the requesting party, or to the alternatives in Rule 34(b)(2), in ordering an appropriate form or forms for production. The court may consider whether a form is electronically searchable in resolving objections to the form of production.

Rule 34(b) also provides that electronically stored information ordinarily need be produced in only one form, but production in an additional form may be ordered for good cause. One such ground might be that the party seeking production cannot use the information in the form in which it was produced. Advance communication about the form that will be used for production might avoid that difficulty.

Rule 37. Failure to Make Disclosure or Cooperate in

Discovery; Sanctions

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(f) Electronically Stored Information. Unless a party

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violated an order in the action requiring it to preserve

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4 electronically stored information, a court may not impose
5 sanctions under these rules on the party for failing to provide such
6 information if:
7 (1) the party took reasonable steps to preserve the
8 information after it knew or should have known the
9 information was discoverable in the action; and
10 (2) the failure resulted from loss of the information
11 because of the routine operation of the party's electronic
12 information system.**

** The Committee is continuing to examine the degree of culpability that will preclude eligibility for a safe harbor from sanctions in this narrow area, where electronically stored information is lost or destroyed as a result of the routine operation of a party's computer system. Some have voiced concerns that the formulation set out above is inadequate to address the uncertainties created by the dynamic nature of computer systems and the information they generate and store. Comments from the bench and bar on whether the culpability or fault that takes a party outside any safe harbor should be something higher than negligence are important to a full understanding of the issues.

An example of a version of Rule 37(f) framed in terms of intentional or reckless failure to preserve information lost as a result of the ordinary operation of a party's computer system is set out below, as a way to focus comment and suggestions:

Committee Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine deletion of information that attends ordinary use. Rule 26(f) is amended to direct the parties to address issues of preserving discoverable information in cases in which they are likely to arise. In many instances, their discussion may result in an agreed protocol for preserving electronically stored information and management of the routine operation of a party's information system to avoid loss of such information. Rule 37(f) provides that, unless a court order requiring preservation of electronically stored information is violated, the court may not impose sanctions under these rules on a party when such information is lost because of the routine operation of its electronic information system if the party took reasonable steps to preserve discoverable information.

Rule 37(f) applies only with regard to information lost due to the "routine operation of the party's electronic information system." The reference to the routine operation of the party's electronic information

Continued from previous page

(f) Electronically Stored Information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:

- (1) the party intentionally or recklessly failed to preserve the information;
or
- (2) the party violated an order issued in the action requiring the preservation of the information.

system is an open-ended attempt to describe the ways in which a specific piece of electronically stored information disappears without a conscious human direction to destroy that specific information. No attempt is made to catalogue the system features that, now or in the future, may cause such loss of information. Familiar examples from present systems include programs that recycle storage media, automatic overwriting of information that has been “deleted,” and programs that automatically discard information that has not been accessed within a defined period. The purpose is to recognize that it is proper to design efficient electronic information storage systems that serve the user’s needs. Different considerations would apply if a system were deliberately designed to destroy litigation-related material.

Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. It does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced. Rule 37(f) does not, however, require that there be an actual discovery request. It requires that a party take reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a litigation hold.

The reasonableness of the steps taken to preserve electronically stored information must be measured in at least three dimensions. The outer limit is set by the Rule 26(b)(1) scope of discovery. A second limit is set by the new Rule 26(b)(2) provision that electronically stored information not reasonably accessible must be provided only on court order for good cause. In most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order. In some instances,

reasonable care may require preservation of electronically stored information that is not reasonably accessible if the party knew or should have known that it was discoverable in the action and could not be obtained elsewhere. Preservation may be less burdensome than access, and is necessary to support discovery under Rule 26(b)(2) if good cause is shown. The third limit depends on what the party knows about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action and which people and systems are likely to have relevant information. Once the subjects and information systems are identified, e-mail records and electronic “files” of key individuals and departments will be the most obvious candidates for preservation. Other candidates for preservation will be more specific to the litigation and information system. Preservation steps should include consideration of system design features that may lead to automatic loss of discoverable information, a problem further addressed in Rule 37(f). In assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending on the nature of the party’s electronic information system and the nature of the litigation.

One consideration that may sometimes be important in evaluating the reasonableness of steps taken is the existence of a statutory or regulatory provision for preserving information, if it required retention of the information sought through discovery. *See, e.g.*, 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm’n Rule 17a-4. Although violation of such a provision does not automatically preclude the protections of Rule 37(f), the court may take account of the statutory or regulatory violation in determining whether the party took reasonable steps to preserve the information for litigation. Whether or not Rule 37(f) is satisfied, violation of such a statutory or regulatory requirement for

preservation may subject the violator to sanctions in another proceeding—either administrative or judicial—but the court may not impose sanctions in the action if it concludes that the party’s steps satisfy Rule 37(f)(1).

Rule 37(f) does not apply if the party’s failure to provide information resulted from its violation of an order in the action requiring preservation of the information. An order that directs preservation of information on identified topics ordinarily should be understood to include electronically stored information. Should such information be lost even though a party took “reasonable steps” to comply with the order, the court may impose sanctions. If such an order was violated in ways that are unrelated to the party’s current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The determination whether to impose a sanction, and the choice of sanction, will be affected by the party’s reasonable attempts to comply.

If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, is for the court. The court has broad discretion to determine whether sanctions are appropriate and to select a proper sanction. *See, e.g.,* Rule 37(b). The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not imply that a court should impose sanctions.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve

the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the court might otherwise not direct.

Rule 45. Subpoena

1 **(a) Form; Issuance.**

2 **(1)** Every subpoena shall

3 **(A)** state the name of the court from which it is
4 issued; and

5 **(B)** state the title of the action, the name of the court
6 in which it is pending, and its civil action number; and

7 **(C)** command each person to whom it is directed to
8 attend and give testimony or to produce and permit
9 inspection, ~~and~~ copying, testing, or sampling of
10 designated books, documents, electronically stored
11 information, or tangible things in the possession,
12 custody or control of that person, or to permit

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13 inspection of premises, at a time and place therein
14 specified; and

15 **(D)** set forth the text of subdivisions (c) and (d) of
16 this rule.

17 A command to produce evidence or to permit inspection,
18 copying, testing, or sampling may be joined with a command to
19 appear at trial or hearing or at deposition, or may be issued
20 separately. A subpoena may specify the form in which
21 electronically stored information is to be produced.

22 **(2)** A subpoena commanding attendance at a trial or
23 hearing shall issue from the court for the district in which the
24 hearing or trial is to be held. A subpoena for attendance at
25 a deposition shall issue from the court for the district
26 designated by the notice of deposition as the district in
27 which the deposition is to be taken. If separate from a
28 subpoena commanding the attendance of a person, a

29 subpoena for production, ~~or inspection, copying, testing, or~~
 30 sampling shall issue from the court for the district in which
 31 the production or inspection is to be made.

32 (3) The clerk shall issue a subpoena, signed but otherwise
 33 in blank, to a party requesting it, who shall complete it
 34 before service. An attorney as officer of the court may also
 35 issue and sign a subpoena on behalf of

36 (A) a court in which the attorney is authorized to
 37 practice; or

38 (B) a court for a district in which a deposition or
 39 production is compelled by the subpoena, if the
 40 deposition or production pertains to an action pending
 41 in a court in which the attorney is authorized to
 42 practice.

43 (b) Service.

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44 (1) A subpoena may be served by any person who is not
45 a party and is not less than 18 years of age. Service of a
46 subpoena upon a person named therein shall be made by
47 delivering a copy thereof to such person and, if the person's
48 attendance is commanded, by tendering to that person the
49 fees for one day's attendance and the mileage allowed by
50 law. When the subpoena is issued on behalf of the United
51 States or an officer or agency thereof, fees and mileage
52 need not be tendered. Prior notice of any commanded
53 production of documents and things or inspection of
54 premises before trial shall be served on each party in the
55 manner prescribed by Rule 5(b).

56 (2) Subject to the provisions of clause (ii) of subparagraph
57 (c)(3)(A) of this rule, a subpoena may be served at any
58 place within the district of the court by which it is issued, or
59 at any place without the district that is within 100 miles of

60 the place of the deposition, hearing, trial, production, ~~or~~
 61 inspection, copying, testing, or sampling specified in the
 62 subpoena or at any place within the state where a state
 63 statute or rule of court permits service of a subpoena issued
 64 by a state court of general jurisdiction sitting in the place of
 65 the deposition, hearing, trial, production, ~~or~~ inspection,
 66 copying, testing, or sampling specified in the subpoena.

67 When a statute of the United States provides therefor, the
 68 court upon proper application and cause shown may
 69 authorize the service of a subpoena at any other place. A
 70 subpoena directed to a witness in a foreign country who is
 71 a national or resident of the United States shall issue under
 72 the circumstances and in the manner and be served as
 73 provided in Title 28, U.S.C. § 1783.

74 **(3)** Proof of service when necessary shall be made by filing
 75 with the clerk of the court by which the subpoena is issued

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76 a statement of the date and manner of service and of the
77 names of the persons served, certified by the person who
78 made the service.

79 **(c) Protection of Persons Subject to Subpoenas.**

80 (1) A party or an attorney responsible for the issuance and
81 service of a subpoena shall take reasonable steps to avoid
82 imposing undue burden or expense on a person subject to
83 that subpoena. The court on behalf of which the subpoena
84 was issued shall enforce this duty and impose upon the party
85 or attorney in breach of this duty an appropriate sanction,
86 which may include, but is not limited to, lost earnings and a
87 reasonable attorney's fee.

88 (2) (A) A person commanded to produce and permit
89 inspection, ~~and copying, testing, or sampling~~ of
90 designated electronically stored information, books,
91 papers, documents or tangible things, or inspection of

92 premises need not appear in person at the place of
93 production or inspection unless commanded to appear
94 for deposition, hearing or trial.

95 **(B)** Subject to paragraph (d)(2) of this rule, a person
96 commanded to produce and permit inspection, ~~and~~
97 ~~copying, testing, or sampling~~ may, within 14 days after
98 service of the subpoena or before the time specified
99 for compliance if such time is less than 14 days after
100 service, serve upon the party or attorney designated in
101 the subpoena written objection to providing inspection
102 ~~or copying of~~ any or all of the designated materials or
103 of the premises—or to providing information in the
104 form requested. If objection is made, the party
105 serving the subpoena shall not be entitled to inspect,
106 ~~and copy, test, or sample~~ the materials or inspect the
107 premises except pursuant to an order of the court by

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108 which the subpoena was issued. If objection has been
109 made, the party serving the subpoena may, upon
110 notice to the person commanded to produce, move at
111 any time for an order to compel the production,
112 inspection, copying, testing, or sampling. Such an
113 order to compel ~~production~~ shall protect any person
114 who is not a party or an officer of a party from
115 significant expense resulting from the inspection and
116 copying commanded.

117 (3) (A) On timely motion, the court by which a
118 subpoena was issued shall quash or modify the
119 subpoena if it

120 (i) fails to allow reasonable time for compliance;
121 (ii) requires a person who is not a party or an
122 officer of a party to travel to a place more than
123 100 miles from the place where that person

124 resides, is employed or regularly transacts
125 business in person, except that, subject to the
126 provisions of clause (c)(3)(B)(iii) of this rule,
127 such a person may in order to attend trial be
128 commanded to travel from any such place within
129 the state in which the trial is held, or
130 (iii) requires disclosure of privileged or other
131 protected matter and no exception or waiver
132 applies, or
133 (iv) subjects a person to undue burden.
134 (B) If a subpoena
135 (i) requires disclosure of a trade secret or other
136 confidential research, development, or
137 commercial information, or
138 (ii) requires disclosure of an unretained expert's
139 opinion or information not describing specific

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140 events or occurrences in dispute and resulting
141 from the expert's study made not at the request
142 of any party, or
143 (iii) requires a person who is not a party or an
144 officer of a party to incur substantial expense to
145 travel more than 100 miles to attend trial, the
146 court may, to protect a person subject to or
147 affected by the subpoena, quash or modify the
148 subpoena or, if the party in whose behalf the
149 subpoena is issued shows a substantial need for
150 the testimony or material that cannot be
151 otherwise met without undue hardship and
152 assures that the person to whom the subpoena is
153 addressed will be reasonably compensated, the
154 court may order appearance or production only
155 upon specified conditions.

156 **(d) Duties in Responding to Subpoena.**

157 (1) (A) A person responding to a subpoena to produce
158 documents shall produce them as they are kept in the
159 usual course of business or shall organize and label
160 them to correspond with the categories in the demand.

161 (B) If a subpoena does not specify the form for
162 producing electronically stored information, a person
163 responding to a subpoena must produce the
164 information in a form in which the person ordinarily
165 maintains it or in an electronically searchable form.
166 The person producing electronically stored information
167 need only produce it in one form.

168 (C) A person responding to a subpoena need not
169 provide discovery of electronically stored information
170 that the person identifies as not reasonably accessible.
171 On motion by the requesting party, the responding

172 party must show that the information sought is not
173 reasonably accessible. If that showing is made, the
174 court may order discovery of the information for good
175 cause.

176 (2) (A) When information subject to a subpoena is
177 withheld on a claim that it is privileged or subject to
178 protection as trial preparation materials, the claim shall
179 be made expressly and shall be supported by a
180 description of the nature of the documents,
181 communications, or things not produced that is
182 sufficient to enable the demanding party to contest the
183 claim.

184 (B) When a person produces information without
185 intending to waive a claim of privilege it may, within a
186 reasonable time, notify any party that received the
187 information of its claim of privilege. After being

188 notified, any party must promptly return, sequester, or
189 destroy the specified information and all copies. The
190 person who produced the information must comply
191 with Rule 45(d)(2)(A) with regard to the information
192 and preserve it pending a ruling by the court.

193 (e) **Contempt.** Failure of any person without adequate excuse
194 to obey a subpoena served upon that person may be deemed a
195 contempt of the court from which the subpoena issued. An
196 adequate cause for failure to obey exists when a subpoena
197 purports to require a non-party to attend or produce at a place
198 not within the limits provided by clause (ii) of subparagraph
199 (c)(3)(A).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information,

as defined in Rule 34(a), can also be sought by subpoena. As under Rule 34(b), Rule 45(a)(1)(D) is amended to provide that the subpoena can designate a form for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that the person served with the subpoena must produce electronically stored information either in a form in which it is usually maintained or in an electronically searchable form, and that the person producing electronically stored information should not have to produce it in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. The Rule 45(c) protections should guard against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena “shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,” and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance “shall protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.” Rule 45(d)(1)(C) is added to provide that the responding person need only provide reasonably accessible electronically stored information, unless the court orders additional discovery for good cause. A parallel provision is added to Rule 26(b)(2). In many cases, advance discussion about the extent, manner, and form of producing electronically stored information should alleviate such concerns.

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the

opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege after inadvertent production of privileged information.

Throughout Rule 45, further amendments have been made to conform the rule to the changes described above.

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _____ (brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically stored information should be handled as follows: _____ (brief description of parties' proposals) _____

The parties have agreed to a privilege protection order, as follows:
(brief description of provisions of proposed order)

All discovery commenced in time to be completed by _____(date)_____. [Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

* * * * *

**B. PROPOSED SUPPLEMENTAL RULE G;
CONFORMING CHANGES IN SUPPLEMENTAL
RULES A, C, AND E, and RULE 26**

Introduction

Civil forfeiture proceedings are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims. Reliance on the Supplemental Rules reflects tradition, the in rem character of forfeiture, and many forfeiture statutes that expressly invoke the Supplemental Rules. But the relationship has come under some strain. Procedures developed over the centuries to respond to the peculiar needs of admiralty practice do not always respond well to the needs of civil forfeiture proceedings. The tensions have increased as the number of civil forfeiture proceedings continues to grow. The Supplemental Rules were amended in 2000 to adopt some distinctions between admiralty and forfeiture practice. The Supreme Court transmitted these changes to Congress at the same time as Congress adopted the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). An immediate consequence was that some details of the amendments had to be revised to avoid superseding statutory provisions that could not have been foreseen when the amendments were working their way through the Enabling Act process. Beyond those particular

details, CAFRA made many other changes that suggested the need for further work on civil forfeiture procedures.

Soon after CAFRA was enacted, the Department of Justice approached the Civil Rules Committee with the suggestion that the time had come to consolidate civil forfeiture procedure into a single supplemental rule that would be consistent with the statute. An Advisory Committee subcommittee was appointed and met frequently by conference call, with a day-long meeting last December. The Subcommittee was greatly assisted in this specialized area by both the Department of Justice and the National Association of Criminal Defense Lawyers, which made suggestions, reviewed drafts, and provided comments. After two years of examination, drafting, and redrafting, the Committee recommends the publication of proposed new Rule G for comment from bench and bar.

1. Background and Synopsis

Rule G seeks to accomplish several goals. Separating civil forfeiture procedures from most admiralty procedure reduces the danger—already a source of concern—that the distinctive needs of forfeiture procedure will distort the interpretation of common provisions in ways that interfere with best admiralty practice, or vice versa. New statutory provisions can be reflected—one example is forfeiture of property located in a foreign country. Developing constitutional law doctrines also can be reflected—one example is the first-ever provision for direct notice to known potential claimants. Distinctive procedural needs can be accommodated—one example is present Rule C(6)(c), which provides for serving interrogatories with the complaint in terms broader than civil forfeiture practice requires (see Rule G(6)). Still other changes reflect

developments in technology, such as the provision for publishing notice on the internet (G(4)(a)(iv)(c)).

The Subcommittee and full Committee considered in depth whether the Rule should define “standing” to assert a claim after the government initiates a civil forfeiture action, to make clear who can put the government to its burden of proof in a forfeiture case. The Department of Justice proposed that the Rule limit claim standing to a person who would qualify as an “owner” within the CAFRA definition of the innocent-owner defense. After extensive study and discussion, the Committee decided not to include a definition of claim standing in the Rule itself. The proposed Rule instead includes provisions addressing the procedures for pretrial determination of standing. The Rule includes procedural protections for both claimants, such as direct notice requirements, and for the government, providing for interrogatories addressing claim standing that must be answered before a motion to dismiss can be granted.

2. *The Rule G Proposals*

The first section of proposed Rule G makes clear that it applies to forfeiture actions *in rem* arising from the violation of a federal statute. Supplemental Rules C & E and the Federal Rules of Civil Procedure also apply to the extent Rule G does not address an issue. The second section sets out the requirements for a complaint, including that it must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. The third section, judicial authorization for arrest and service of process, incorporates statutory procedures for real property, and details the application of an arrest warrant with respect to other property, specifying the requirements for property in the government’s possession, property not in the government’s possession, or property subject to a judicial

restraining order. The section also specifies by whom and when a warrant is to be executed, depending on whether the property is within or outside the United States.

The fourth section sets out notice requirements. The proposed rule sets out requirements for the frequency and contents of published notice, including the anticipated use of the internet to provide a designated government forfeiture site that would provide a more reliable and less costly means of publishing notice. It also requires that the government send notice to any person who reasonably appears to be a potential claimant, and describes means for sending the notice. The fifth section addresses requirements for filing a claim and an answer or motion under Rule 12 of the Federal Rules of Civil Procedure. A claim must identify the property claimed, the claimant, and the claimant's interest in the property, information necessary to determine whether the claimant has standing to assert a claim. Section six provides that in order to gain more information necessary to determine whether a claimant has standing, the government may serve special interrogatories limited to the claimant's identity and relationship to the property. If the claimant moves to dismiss, the government must serve these interrogatories within twenty days after the motion is served. The government need not respond to the motion to dismiss until twenty days after the claimant answers these special interrogatories.

Section seven addresses the preservation and disposition of property, including sales. Section eight addresses motions, including motions to suppress and to dismiss. It provides that only a claimant who establishes standing to contest the forfeiture may move to dismiss under Rule 12(b). If the government moves to strike a claim or answer, the court must decide this motion before deciding any motion by the claimant to dismiss the forfeiture. This section, together with section six, provides

a framework for pretrial determination of claim standing. Section eight also addresses petitions to release property pending trial and motions to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

The final section of the rule makes it clear that trials are to the court unless any party demands a trial by jury under Rule 38. Conforming amendments are made to Supplemental Rules A, C, and E. Rule 26(a)(1) is amended to add civil forfeiture actions to the list of exemptions to the initial disclosure requirements, recognizing that Rule G specifically addresses what information must be provided in such actions.

3. *Conclusion*

The proposed amendments, and Note language, are attached.

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule G. Forfeiture Actions In Rem

- 1 **(1) Scope.** This rule governs a forfeiture action in rem arising
- 2 from a federal statute. To the extent that this rule does not
- 3 address an issue, Supplemental Rules C and E and the Federal
- 4 Rules of Civil Procedure also apply.
- 5 **(2) Complaint.** The complaint must:

6 (a) be verified;

7 (b) state the grounds for subject-matter jurisdiction, in rem
8 jurisdiction over the defendant property, and venue;

9 (c) describe the property with reasonable particularity;

10 (d) if the property is tangible, state its location when any
11 seizure occurred and—if different—its location when the
12 action is filed;

13 (e) identify the statute under which the forfeiture action is
14 brought; and

15 (f) state sufficiently detailed facts to support a reasonable
16 belief that the government will be able to meet its burden of
17 proof at trial.

18 **(3) Judicial Authorization and Process.**

19 (a) **Real Property.** If the defendant is real property, the
20 government must proceed under 18 U.S.C. § 985.

21 **(b) Other Property; Arrest Warrant.** If the defendant
22 is not real property:

23 (i) the clerk must issue a warrant to arrest the
24 property if it is in the government's possession;

25 (ii) the court—on finding probable cause—must
26 issue a warrant to arrest the property if it is not in the
27 government's possession and is not subject to a
28 judicial restraining order; and

29 (iii) a warrant is not necessary if the property is
30 subject to a judicial restraining order.

31 **(c) Execution of Process.**

32 (i) The warrant and any supplemental process must
33 be delivered to a person or organization authorized to
34 execute it, who may be: (A) a marshal; (B) someone
35 under contract with the United States; (C) someone

36 pecially appointed by the court for that purpose; or

37 (D) any United States officer or employee.

38 (ii) The authorized person or organization must

39 execute the warrant and any supplemental process on

40 property in the United States as soon as practicable

41 unless:

42 (A) the property is in the government's

43 possession; or

44 (B) the court orders a different time when the

45 complaint is under seal, the action is stayed

46 before the warrant and supplemental process are

47 executed, or the court finds other good cause.

48 (iii) The warrant and any supplemental process may

49 be executed within the district or, when authorized by

50 statute, outside the district.

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51 (iv) If executing a warrant on property outside the
52 United States is required, the warrant may be
53 transmitted to an appropriate authority for serving
54 process where the property is located.

55 **(4) Notice.**

56 **(a) Notice by Publication.**

57 **(i) When Publication Is Required.** A judgment
58 of forfeiture may be entered only if the government has
59 published notice of the action within a reasonable time
60 after filing the complaint or at a time the court orders.

61 But notice need not be published if:

62 (A) the defendant property is worth less than
63 \$1,000 and direct notice is sent under (4)(b) to
64 every person the government can reasonably
65 identify as a potential claimant; or

66 **(B)** the court finds that the cost of publication
67 exceeds the property's value and that other
68 means of notice would satisfy due process.

69 **(ii) Content of the Notice.** Unless the court
70 orders otherwise, the notice must:

71 **(A)** describe the property with reasonable
72 particularity;

73 **(B)** state the times under (5) to file a claim and
74 to answer; and

75 **(C)** name the government attorney to be
76 served with the claim and answer.

77 **(iii) Frequency of Publication.** Published notice
78 must appear

79 **(A)** once a week for three consecutive weeks,

80 or

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81 (B) only once if, before the action was filed,
82 notice of nonjudicial forfeiture of the same
83 property was published on an official internet
84 government forfeiture site for at least 30
85 consecutive days, or in a newspaper of general
86 circulation for three consecutive weeks in a
87 district where publication is authorized under
88 (4)(a)(iv).

89 (iv) **Means of Publication.** The government should
90 select from the following options a means of
91 publication reasonably calculated to notify potential
92 claimants of the action:

93 (A) if the property is in the United States,
94 publication in a newspaper generally circulated
95 in the district where the action is filed, where the

96 property was seized, or where property that was
97 not seized is located;

98 (B) if the property is outside the United States,
99 publication in a newspaper generally circulated
100 in a district where the action is filed, in a
101 newspaper generally circulated in the country
102 where the property is located, or in legal notices
103 published and generally circulated in the country
104 where the property is located; or
105 (C) instead of (A) and (B), posting a notice on
106 an official internet government forfeiture site for
107 at least 30 consecutive days.

108 **(b) Notice to Known Potential Claimants.**

109 **(i) Direct Notice Required.** The government must
110 send notice of the action and a copy of the complaint
111 to any person who reasonably appears to be a

112 potential claimant on the facts known to the
113 government before the end of the time for filing a claim
114 under (5)(a)(ii)(B).

115 **(ii) Content of the Notice.** The notice must state:

116 (A) the date when the notice is sent;

117 (B) a deadline for filing a claim, at least 35

118 days after the notice is sent;

119 (C) that an answer or a motion under Rule 12

120 must be filed no later than 20 days after filing the

121 claim; and

122 (D) the name of the government attorney to be

123 served with the claim and answer.

124 **(iii) Sending Notice.**

125 (A) The notice must be sent by means

126 reasonably calculated to reach the potential

127 claimant.

128 (B) Notice may be sent to the potential
129 claimant or to the attorney representing the
130 potential claimant with respect to the seizure of
131 the property or in a related investigation,
132 administrative forfeiture proceeding, or criminal
133 case.

134 (C) Notice sent to a potential claimant who is
135 incarcerated must be sent to the place of
136 incarceration.

137 (D) Notice to a person arrested in connection
138 with an offense giving rise to the forfeiture who
139 is not incarcerated when notice is sent may be
140 sent to the address that person last gave to the
141 agency that arrested or released the person.

142 (E) Notice to a person from whom the
143 property was seized who is not incarcerated

144 when notice is sent may be sent to the last
145 address that person gave to the agency that
146 seized the property.

147 **(iv) When Notice Is Sent.** Notice by the following
148 means is sent on the date when it is placed in the mail,
149 delivered to a commercial carrier, or sent by
150 electronic mail.

151 **(v) Actual Notice.** A potential claimant who had
152 actual notice of a forfeiture action may not oppose or
153 seek relief from forfeiture because of the government's
154 failure to send the required notice.

155 **(5) Responsive Pleadings.**

156 **(a) Filing a Claim.**

157 **(i) A person who asserts an interest in the**
158 **defendant property may contest the forfeiture by filing**

159 a claim in the court where the action is pending. The
160 claim must:

161 (A) identify the specific property claimed;

162 (B) identify the claimant and state the

163 claimant's interest in the property;

164 (C) be signed by the claimant under penalty of
165 perjury; and

166 (D) be served on the government attorney
167 designated under (4)(a)(ii)(C) or (b)(ii)(D).

168 (ii) Unless the court for good cause sets a different
169 time, the claim must be filed:

170 (A) by the time stated in a direct notice sent
171 under (4)(b);

172 (B) if notice was published but direct notice
173 was not sent to the claimant or the claimant's
174 attorney, no later than 30 days after final

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175 publication of newspaper notice or legal notice
176 under 4(a) or no later than 60 days after the first
177 day of publication on an official internet
178 government forfeiture site; or
179 (C) if notice was not published and direct
180 notice was not sent to the claimant or the
181 claimant's attorney:
182 (1) if the property was in government
183 possession when the complaint was filed,
184 no later than 60 days after the filing, not
185 counting any time when the complaint was
186 under seal or when the action was stayed
187 before execution of a warrant issued under
188 (3)(b); or
189 (2) if the property was not in government
190 possession when the complaint was filed,

191 no later than 60 days after the government
192 complied with 18 U.S.C. § 985(c) as to
193 real property, or 60 days after process
194 was executed on the property under (3).

195 (iii) A claim filed by a person asserting an interest as
196 a bailee must identify the bailor.

197 (b) Answer. A claimant must serve and file an answer to
198 the complaint or a motion under Rule 12 within 20 days
199 after filing the claim. A claimant waives an objection to in
200 rem jurisdiction or to venue if the objection is not made by
201 motion or stated in the answer.

202 **(6) Special Interrogatories.**

203 (a) Time and Scope. The government may serve special
204 interrogatories under Rule 33 limited to the claimant's
205 identity and relationship to the defendant property without
206 the court's leave at any time after the claim is filed and

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207 before discovery is closed. But if the claimant serves a
208 motion to dismiss the action, the government must serve the
209 interrogatories within 20 days after the motion is served.

210 **(b) Answers or Objections.** Answers or objections to
211 these interrogatories must be served within 20 days after the
212 interrogatories are served.

213 **(c) Government's Response Deferred.** The
214 government need not respond to a claimant's motion to
215 dismiss the action under (8)(b) until 20 days after the
216 claimant has answered these interrogatories.

217 **(7) Preserving and Disposing of Property; Sales.**

218 **(a) Preserving Property.** When the government does
219 not have actual possession of the defendant property the
220 court, on motion or on its own, may enter any order
221 necessary to preserve the property and to prevent its
222 removal or encumbrance.

223 **(b) Interlocutory Sale or Delivery.**

224 **(i) Order to Sell.** On motion by a party or a
225 person having custody of the property, the court may
226 order all or part of the property sold if:

227 **(A)** the property is perishable or at risk of
228 deterioration, decay, or injury by being detained
229 in custody pending the action;

230 **(B)** the expense of keeping the property is
231 excessive or is disproportionate to its fair market
232 value;

233 **(C)** the property is subject to a mortgage or to
234 taxes on which the owner is in default; or

235 **(D)** the court finds other good cause.

236 **(ii) Who Makes the Sale.** A sale must be made by
237 a United States agency that has custody of the

238 property, by the agency's contractor, or by any
 239 person the court designates.

240 **(iii) Sale Procedures.** The sale is governed by 28
 241 U.S.C. §§ 2001, 2002, and 2004, unless all parties,
 242 with the court's approval, agree to the sale, aspects of
 243 the sale, or different procedures.

244 **(iv) Sale Proceeds.** Sale proceeds are a substitute
 245 res subject to forfeiture in place of the property that
 246 was sold. The proceeds must be held in an interest-
 247 bearing account maintained by the United States
 248 pending the conclusion of the forfeiture action.

249 **(v) Delivery on a Claimant's Motion.** The court
 250 may order that the property be delivered to the
 251 claimant pending the conclusion of the action if the
 252 claimant shows circumstances that would permit sale
 253 under (i) and gives security under these rules.

254 **(c) Disposing of Forfeited Property.** Upon entry of a
255 forfeiture judgment, the property or proceeds from selling
256 the property must be disposed of as provided by law.

257 **(8) Motions.**

258 **(a) Motion To Suppress Use of the Property as**
259 **Evidence.** If the defendant property was seized, a party
260 with standing to contest the lawfulness of the seizure may
261 move to suppress use of the property as evidence.
262 Suppression does not affect forfeiture of the property based
263 on independently derived evidence.

264 **(b) Motion To Dismiss the Action.**

265 **(i)** A claimant who establishes standing to contest
266 forfeiture may move to dismiss the action under Rule
267 12(b).

268 **(ii)** In an action governed by 18 U. S. C.
269 § 983(a)(3)(D) the complaint may not be dismissed on

270 the ground that the government did not have adequate
 271 evidence at the time the complaint was filed to
 272 establish the forfeitability of the property. The
 273 sufficiency of the complaint is governed by (2).

274 **(c) Motion To Strike a Claim or Answer.**

275 **(i) At any time before trial, the government may**
 276 **move to strike a claim or answer:**

277 **(A) for failing to comply with (5) or (6); or**
 278 **(B) because the claimant lacks standing to**
 279 **contest the forfeiture.**

280 **(ii) The government's motion must be decided**
 281 **before any motion by the claimant to dismiss the**
 282 **action.**

283 **(iii) If, because material facts are in dispute, a motion**
 284 **under (i)(B) cannot be resolved on the pleadings, the**
 285 **court must conduct a hearing. The claimant has the**

286 burden of establishing standing based on a
287 preponderance of the evidence.

288 **(d) Petition To Release Property.**

289 (i) If a United States agency or an agency's
290 contractor holds property for judicial or nonjudicial
291 forfeiture under a statute governed by 18 U.S.C.
292 § 983(f), a person who has filed a claim to the
293 property may petition for its release under § 983(f).

294 (ii) If a petition for release is filed before a judicial
295 forfeiture action is filed against the property, the
296 petition may be filed either in the district where the
297 property was seized or in the district where a warrant
298 to seize the property issued. If a judicial forfeiture
299 action against the property is later filed in another
300 district—or if the government shows that the action

301 will be filed in another district—the petition may be
 302 transferred to that district under 28 U.S.C. § 1404.
 303 **(e) Excessive Fines.** A claimant may seek to mitigate a
 304 forfeiture under the Excessive Fines Clause of the Eighth
 305 Amendment by motion for summary judgment or by motion
 306 made after entry of a forfeiture judgment if:
 307 (i) the claimant has pleaded the defense under Rule
 308 8, and
 309 (ii) the parties have had the opportunity to conduct
 310 civil discovery on the defense.
 311 **(9) Trial.**
 312 Trial is to the court unless any party demands trial by jury
 313 under Rule 38.

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions

has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit—subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action “state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.” Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(f). The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See U.S. v. Mondragon*, 313 F.3d 862 (4th Cir.2002). Subdivision (2)(f) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) reflects the provisions of 18 U.S.C. § 985.

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government’s possession. If the property is not in the government’s possession and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property. This provision

departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does not reflect any independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than \$1,000 and direct notice is sent to all reasonably identifiable potential claimants as required by subdivision (4)(b). Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. A reasonable choice of the means most likely to reach potential claimants at a cost reasonable in the circumstances suffices.

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or— if the property was not seized—where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides.

Paragraph (b). Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to send notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Many potential claimants will be known to the government because they have filed claims during the administrative forfeiture stage. Notice must be sent, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to send notice terminates when the time for filing a claim expires.

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C. § 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced

by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed “not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *.” This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances. It may be reasonable, for example, to rely on means that have already been established for communication with a particular potential claimant. The government’s interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case. This provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice.

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration. Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. *See Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government is not obliged to undertake an independent investigation to verify the address.

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies

this procedure as well to actions not covered by § 983. “Claim” is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of “claim” in admiralty practice.

If the claimant states its interest in the property to be as bailee, the bailor should be identified.

The claim must be signed under penalty of perjury by the person making it. An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim “shall file an answer to the Government’s complaint for forfeiture not later than 20 days after the date of the filing of the claim.” Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), *see U.S. v. \$8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion

under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).

A claimant's motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the adaptation of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed, to gather information that bears on the claimant's standing. Subdivisions (8)(b) and (c) allow a claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property. If the claimant asserts a relationship to the property as bailee, the interrogatories can inquire into the bailor's interest in the

property and the bailee's relationship to the bailor. The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss—the interrogatories must be served within 20 days after the motion is served. Integration is further accomplished by deferring the government's obligation to respond to a motion to dismiss until 20 days after the claimant moving to dismiss has answered the interrogatories.

The statement that subdivision (6) interrogatories are served under Rule 33 recognizes that these interrogatories are included in applying the numerical limit in Rule 33(a).

Subdivision (6) supersedes the discovery "moratorium" of Rule 26(d) and the broader interrogatories permitted for admiralty proceedings by Rule C(6).

Subdivision (7)

Paragraph (a). Paragraph (a) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property.

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case. This provision does not address the questions whether a mortgagee or other lien holder can force sale of property held for forfeiture or whether the court can enjoin the sale. Neither does it attempt to account for the interest that a crime victim may have in restoration of forfeited property under 18 U.S.C. § 981(e)(6).

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to diminution in value—the classic example is a load of fresh fish. Care should be taken before ordering sale to avoid diminished value. In some cases the government and claimants will agree to sale. But this ground should be invoked with restraint in circumstances that do not involve physical deterioration. An automobile, for example, is likely to lose value continually unless it is a collector's item. Shares of stock are subject to market-value fluctuations. But the government's interest in maximizing the value gained upon forfeiture and in avoiding storage costs must be balanced against the claimant's interests. A claimant may prefer to regain the specific asset, or to retain a voice in the timing of sale in relation to market fluctuations through the agreed-sale provisions of (b)(iii).

Paragraph (b)(iii) recognizes that if the court approves, the interests of all parties may be served by their agreement to sale, aspects of the sale, or sale procedures that depart from governing statutory procedures.

Paragraph (c) draws from Rule E(9)(a), (b), and (c). Disposition of the proceeds as provided by law may require resolution of disputed issues. A mortgagee's claim to the property or sale proceeds, for example, may be disputed on the ground that the mortgage is not genuine. An undisputed lien claim, on the other hand, may be recognized by payment after an interlocutory sale.

Subdivision (8)

Subdivision (8) addresses a number of issues that are unique to civil forfeiture actions.

Paragraph (a). Standing to suppress use of seized property as evidence is governed by principles distinct from the principles that govern claim standing. A claimant with standing to contest forfeiture may not have standing to seek suppression. Rule G does not of itself create a basis of suppression standing that does not otherwise exist.

Paragraph (b). Paragraph (b)(i) is one element of the system that integrates the procedures for determining a claimant's standing to claim and for deciding a claimant's motion to dismiss the action. Under paragraph (c)(ii), a motion to dismiss the action cannot be addressed until the court has decided any government motion to strike the claim or answer. This procedure is reflected in the (b)(i) reminder that a motion to dismiss the forfeiture action may be made only by a claimant who establishes claim standing. The government, moreover, need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered any subdivision (6) interrogatories.

Paragraph (b)(ii) mirrors 18 U.S.C. § 983(a)(3)(D). It applies only to an action independently governed by § 983(a)(3)(D), implying nothing as to actions outside § 983(a)(3)(D). The adequacy of the complaint is measured against the pleading requirements of subdivision (2), not against the quality of the evidence available to the government when the complaint was filed.

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing.

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failure to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or

answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. So too, not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (d). The hardship release provisions of 18 U.S.C. § 983(f) do not apply to a civil forfeiture action exempted from § 983 by § 983(i).

Paragraph (d)(ii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a “civil action” eligible for transfer under 28 U.S.C. § 1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of the different parts of the same forfeiture proceeding in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another is whether continued government possession would prevent the claimant from working—whether seizure of the claimant’s automobile prevents work may turn on assessing the realities of local public transit facilities.

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a “petition” “to determine whether the forfeiture was constitutionally excessive” based on finding “that the forfeiture is grossly disproportional to the offense.” Paragraph (e) describes the procedure for § 983(g) mitigation petitions, and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered. The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture. For that reason it may be convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38.

Supplemental Rules A, C, E Amended To Conform to G**Rule A. Scope of Rules**

1 **(1)** These Supplemental Rules apply to:

2 **(A)** the procedure in admiralty and maritime claims within
3 the meaning of Rule 9(h) with respect to the following
4 remedies:

5 **(i1)** maritime attachment and garnishment;

6 **(ii2)** actions in rem;

7 **(iii3)** possessory, petitory, and partition actions, and;

8 **(iv4)** actions for exoneration from or limitation of
9 liability;

10 **(B)** forfeiture actions in rem arising from a federal statute;

11 and

12 **(C)** ~~These rules also apply to~~ the procedure in statutory
13 condemnation proceedings analogous to maritime actions in
14 rem, whether within the admiralty and maritime jurisdiction

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15 or not. Except as otherwise provided, references in these
16 Supplemental Rules to actions in rem include such analogous
17 statutory condemnation proceedings.
18 **(2)** ~~The general Federal Rules of Civil Procedure for the United~~
19 ~~States District Courts are also applicable~~ apply to the foregoing
20 proceedings except to the extent that they are inconsistent with
21 these Supplemental Rules.

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions. Rule G(1) contemplates application of other Supplemental Rules to the extent that Rule G does not address an issue. One example is the Rule E(4)(c) provision for arresting intangible property.

Rule C. In Rem Actions: Special Provisions

- 1 **(1) When Available.** An action in rem may be brought:
2 **(a)** To enforce any maritime lien;

3 **(b)** Whenever a statute of the United States provides for
4 a maritime action in rem or a proceeding analogous thereto.

5 * * * * *

6 **(2) Complaint.** In an action in rem the complaint must:

7 **(a)** be verified;

8 **(b)** describe with reasonable particularity the property that
9 is the subject of the action; and

10 **(c)** ~~in an admiralty and maritime proceeding~~ state that the
11 property is within the district or will be within the district
12 while the action is pending;

13 ~~**(d)** in a forfeiture proceeding for violation of a federal~~
14 ~~statute, state:~~

15 ~~**(i)** the place of seizure and whether it was on land~~
16 ~~or on navigable waters;~~

17 ~~**(ii)** whether the property is within the district, and if~~
18 ~~the property is not within the district the statutory basis~~

19 ~~for the court's exercise of jurisdiction over the~~
20 ~~property; and~~
21 ~~(iii) all allegations required by the statute under which~~
22 ~~the action is brought.~~

23 **(3) Judicial Authorization and Process.**

24 **(a) Arrest Warrant.**

25 ~~(i) When the United States files a complaint~~
26 ~~demanding a forfeiture for violation of a federal~~
27 ~~statute, the clerk must promptly issue a summons and~~
28 ~~a warrant for the arrest of the vessel or other property~~
29 ~~without requiring a certification of exigent~~
30 ~~circumstances, but if the property is real property the~~
31 ~~United States must proceed under applicable statutory~~
32 ~~procedures.~~

33 ~~(iii)(A) — In other actions, t~~The court must review
34 the complaint and any supporting papers.

* * * * *

(iiB) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any ~~postarrest~~ post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and

51 any supplemental process must be delivered to a
 52 person or organization authorized to enforce it, who
 53 may be: (A) a marshal; (B) someone under contract
 54 with the United States; (C) someone specially
 55 appointed by the court for that purpose; or (D) in an
 56 action brought by the United States, any officer or
 57 employee of the United States.

58 * * * * *

59 **(6) Responsive Pleading; Interrogatories.**

60 ~~(a) Civil Forfeiture.~~ In an in rem forfeiture action for
 61 violation of a federal statute:

62 ~~(i) a person who asserts an interest in or right~~
 63 ~~against the property that is the subject of the action~~
 64 ~~must file a verified statement identifying the interest or~~
 65 ~~right.~~

66 ~~(A) within 30 days after the earlier of (1) the~~
67 ~~date of service of the Government's complaint~~
68 ~~or (2) completed publication of notice under~~
69 ~~Rule C(4), or~~

70 ~~(B) within the time that the court allows.~~

71 ~~(ii) an agent, bailee, or attorney must state the~~
72 ~~authority to file a statement of interest in or right~~
73 ~~against the property on behalf of another; and~~

74 ~~(iii) a person who files a statement of interest in or~~
75 ~~right against the property must serve and file an~~
76 ~~answer within 20 days after filing the statement.~~

77 **(ab) Maritime Arrests and Other Proceedings.** ~~In an~~
78 ~~rem action not governed by Rule C(6)(a):~~

79 * * * * *

80 **(bc) Interrogatories.**

81 * * * * *

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

* * * * *

1

2 **(3) Process.**

3 **(a)** In admiralty and maritime proceedings process in rem
4 or of maritime attachment and garnishment may be served
5 only within the district.

6 ~~**(b)** In forfeiture cases process in rem may be served~~
7 ~~within the district or outside the district when authorized by~~
8 ~~statute.~~

9 **(b*e*) Issuance and Delivery.**

10 * * * * *

11 **(5) Release of Property.**

12 **(a) Special Bond.** ~~Except in cases of seizures for~~
13 ~~forfeiture under any law of the United States, w~~Whenever
14 process of maritime attachment and garnishment or process
15 in rem is issued the execution of such process shall be
16 stayed, or the property released, on the giving of security, to
17 be approved by the court or clerk, or by stipulation of the
18 parties, conditioned to answer the judgment of the court or
19 of any appellate court. The parties may stipulate the amount
20 and nature of such security. In the event of the inability or
21 refusal of the parties so to stipulate the court shall fix the
22 principal sum of the bond or stipulation at an amount
23 sufficient to cover the amount of the plaintiff's claim fairly
24 stated with accrued interest and costs; but the principal sum
25 shall in no event exceed (i) twice the amount of the plaintiff's
26 claim or (ii) the value of the property on due appraisalment,
27 whichever is smaller. The bond or stipulation shall be

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28 conditioned for the payment of the principal sum and interest
29 thereon at 6 per cent per annum.

30 * * * * *

31 **(9) Disposition of Property; Sales.**

32 ~~**(a) Actions for Forfeitures.** In any action in rem to~~
33 ~~enforce a forfeiture for violation of a statute of the United~~
34 ~~States the property shall be disposed of as provided by~~
35 ~~statute.~~

36 **(ab) Interlocutory Sales; Delivery.**

37 * * * * *

38 (ii) In the circumstances described in ~~Rule E(9)~~
39 subdivision (ab)(i), the court, on motion by a
40 defendant or a person filing a statement of interest or
41 right under Rule C(6), may order that the property,
42 rather than being sold, be delivered to the movant
43 upon giving security under these rules.

45

Committee Note

federal statute;

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- 10 **(iii)** a petition for habeas corpus or other
11 proceeding to challenge a criminal conviction or
12 sentence;
- 13 **(iiiiv)** an action brought without counsel by a
14 person in custody of the United States, a state,
15 or a state subdivision;
- 16 **(ivv)** an action to enforce or quash an
17 administrative summons or subpoena;
- 18 **(vvi)** an action by the United States to recover
19 benefit payments;
- 20 **(vivii)** an action by the United States to collect
21 on a student loan guaranteed by the United
22 States;
- 23 **(viiiviii)** a proceeding ancillary to proceedings in
24 other courts; and

25 (viiiix) an action to enforce an arbitration
 26 award.

27 * * * * *

Committee Note

Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

C. PROPOSED AMENDMENT TO RULE 50(b)

Introduction

The Advisory Committee recommends publication for comment of an amendment to Rule 50(b) to permit renewal after trial of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion made before the close of the evidence be renewed at the close of all the evidence. Separately, the proposed amendment adds a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion.

1. Background and Synopsis

The proposed amendment addresses the problem that arises when a party moved for judgment as a matter of law before the close of all the evidence, failed to renew the motion at the close of all the evidence, then

filed a postverdict motion renewing the motion for judgment as a matter of law. The appellate decisions have begun to permit slight relaxations of the requirement that a postverdict motion be supported by—be a renewal of—a motion made at the close of all the evidence. These are departures, however, made to avoid harsh results that seemed required by the current rule language. The departures come at the price of increasingly uncertain doctrine and practice and may invite more frequent appeals. Other courts adhere to the rule's language, holding that a motion at the close of all the evidence was necessary even if the party had made an earlier motion based on the same grounds.

The proposed amendment deletes the requirement of a motion at the close of all the evidence, permitting renewal of any Rule 50(a) motion for judgment as a matter of law made during trial. Such a motion is a renewed motion and can be supported only by arguments made in support of the earlier motion. The proposed amendment reflects the belief that a motion made during trial serves all the functional needs served by a motion at the close of all of the evidence. As now, the posttrial motion renews the trial motion and can be supported only by arguments made to support the trial motion. The opposing party has had clear notice of the asserted deficiencies in the case and a final opportunity to correct them. Satisfying these functional purposes equally satisfies Seventh Amendment concerns.

Separately, the proposed amendment also provides a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. The Advisory Committee agenda has carried for some years the question whether to revise Rule 50(b) to establish a clear time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict. The question was raised by Judge Stotler while she chaired the Standing Committee. The problem appears on the face of the rule, which seems to allow a motion at the close of the evidence at the first trial to be renewed

at any time up to ten days after judgment is entered following a second (or still later) trial. It would be folly to disregard the sufficiency of the evidence at a second trial in favor of deciding a motion based on the evidence at the first trial, and unwise to allow the question to remain open indefinitely during the period leading up to the second trial. There is authority saying that the motion must be renewed ten days after the jury is discharged. See C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d*, § 2357, p. 353. This authority traces to the 1938 version of Rule 50(b), which set the time for a judgment n.o.v. motion at ten days after the jury was discharged if a verdict was not returned. This provision was deleted in 1991, but the Committee Note says only that amended Rule 50(b) “retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment.” Research into the Advisory Committee deliberations that led to the 1991 amendment has failed to show any additional explanation. It now seems better to restore the 1991 deletion.

2. Conclusion

The proposed amendments to Rule 50(b), with Note language, are attached.

Rule 50. Judgment as a Matter of Law in Jury Trials;

Alternative Motion for New Trial; Conditional Rulings

- 1 **(a) Judgment as a Matter of Law.**
- 2 ~~—— (1) If during a trial by jury a party has been fully heard on~~
- 3 ~~an issue and there is no legally sufficient evidentiary~~

4 basis for a reasonable jury to find for that party on that
 5 issue, the court may determine the issue against that
 6 party and may grant a motion for judgment as a matter
 7 of law against that party with respect to a claim or
 8 defense that cannot under the controlling law be
 9 maintained or defeated without a favorable finding on
 10 that issue.

11 ~~—— (2) Motions for judgment as a matter of law may be made~~
 12 ~~at any time before submission of the case to the jury.~~
 13 ~~Such a motion shall specify the judgment sought and~~
 14 ~~the law and the facts on which the moving party is~~
 15 ~~entitled to the judgment.~~

16 (1) In General. If a party has been fully heard on an
 17 issue during a jury trial and the court finds that a
 18 reasonable jury would not have a legally sufficient

19 evidentiary basis to find for the party on that issue, the

20 court may:

21 (A) determine the issue against the party; and

22 (B) grant a motion for judgment as a matter of law

23 against the party on a claim or defense that, under the

24 controlling law, can be maintained or defeated only

25 with a favorable finding on that issue.

26 (2) Motion. A motion for judgment as a matter of law

27 may be made at any time before the case is submitted to the

28 jury. The motion must specify the judgment sought and the

29 law and facts that entitle the movant to the judgment.

30 **(b) Renewing the Motion for Judgment After Trial;**

31 **Alternative Motion for a New Trial.** If, ~~for any reason,~~ the

32 court does not grant a motion for judgment as a matter of law

33 made ~~at the close of all the evidence~~ under subdivision (a), the

34 court is ~~considered~~ deemed to have submitted the action to the

35 jury subject to the court's later deciding the legal questions raised
 36 by the motion. The movant may renew its request for judgment
 37 as a matter of law by filing a motion no later than 10 days after the
 38 entry of judgment, or—if the motion addresses a jury issue not
 39 decided by a verdict—by filing a motion no later than 10 days
 40 after the jury was discharged. ~~—and~~ The movant may
 41 alternatively request a new trial or join a motion for a new trial
 42 under Rule 59.

43 In ruling on a renewed motion, the court may:

- 44 (1) if a verdict was returned:
 - 45 (A) allow the judgment to stand,
 - 46 (B) order a new trial, or
 - 47 (C) direct entry of judgment as a matter of law; or
- 48 (2) if no verdict was returned:
 - 49 (A) order a new trial, or
 - 50 (B) direct entry of judgment as a matter of law.

Committee Note

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the earlier motion, it can be supported only by arguments made in support of the earlier motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a post-trial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

* * * * *